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OFFICE OF APPEALS AND DISPUTE RESOLUTION

July 3, 2007

In the Matter of Frederick Sewall
and Nehoiden Knoll, Inc.

Docket No. WET-2008-011
DEP File No. 28-1876
Needham

RECOMMENDED FINAL DECISION

On February 8, 2008, the Petitioners (also the Applicants) Mr. Frederick Sewall and Nehoiden Knoll, Inc., (the "Petitioners") filed a notice of claim with the Office of Appeals and Dispute Resolution ("OADR") requesting an adjudicatory hearing with regard to a Superseding Order of Conditions ("SOC") denying a project for construction of residential units on Nehoiden Street, Needham (the "Property"). The SOC was issued under the authority of the Wetlands Protection Act, M.G.L. c. 131, section 40, and Wetlands Regulations at 310 CMR 10.00 et seq. At a Pre-Screening Conference on Wednesday, March 12, 2008 the Petitioner, the Department and a group of ten residents ("Intervenors") met with the Presiding Officer and developed a schedule for proceedings, including motion practice, filing of the parties' Direct Cases, and a hearing date. At the Conference, both the Department and Intervenors raised numerous well-

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founded objections to Petitioners' project. Petitioners' representative stated that they would consider developing a new plan to respond to those concerns and presenting such plan through a new engineer witness.

I. History of Proceedings

Petitioners did develop such a plan and filed it in a timely manner on April 28, 2008 with the prefiled direct testimony of two expert witnesses, Robert Gemma, P.E. and Brian Butler, a wetlands scientist. Petitioners also sought and received the approval of the local conservation commission for the filing of the new plan. The Department responded by filing prefiled direct testimony of Rachel Freed, Acting Section Chief for the Northeast Regional Wetlands Program that concurred with the testimony of Petitioners' expert witnesses.¹

Intervenors, on the other hand, filed motions to object to the new plans and to request additional time to review them. By the time those motions were responded to and denied by the Presiding Officer, Intervenors' deadline of May 27, 2008 for filing their direct case had arrived. Intervenors chose not to file any testimony or legal argument by that deadline. Intervenors' counsel informed Petitioners' counsel by written email that Intervenors chose to cease participation in this matter. In response, Petitioner filed a motion for summary decision jointly with the Department. The Presiding Officer cancelled the hearing that had been scheduled for Monday, June 9, 2008, and stayed the matter to enable the preparation of a ruling upon the Petitioners' and the Department's joint motion for summary decision.

II. Summary of Issues and Overview of Testimony

Two issues were established for resolution in this matter at the pre-screening conference:

1. Whether adequate information has been submitted to demonstrate compliance with the Riverfront performance standards at 310 CMR 10.58?

¹ I find all three witnesses to be qualified to testify as to the subject matters contained in their prefiled direct testimony.

2. Whether the proposed project meets Riverfront area performance standards at 310 CMR 10.58(4)(d)(1) and 310 CMR 10.58(5)(a)-(e)?

Petitioners submitted a revised plan for the project entitled “Proposed Site Plan in Needham, Mass.” dated April 23, 2008 and prepared by MetroWest Engineering, Inc. and submitted into evidence via the expert witness testimony of Mr. Gemma (the “Revised Plan”). Petitioners also submitted a proposed site restoration plan entitled “Nehoiden Knoll Outer Riverfront Area Restoration Plan” and dated April 25, 2008 via the expert witness testimony of Mr. Butler (the “Restoration Plan”). Ms. Freed has concurred that these two plans together constituted a project that does provide enough information for the Department to determine compliance with the Wetlands Regulations and that the project does now so comply with 310 CMR 10.58.

III. Standards for Summary Decision

The Adjudicatory Proceeding Rules, 310 CMR 1.01 et seq., provide for the issuance of summary decision where the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. See, 310 CMR 1.01(11)(f). The moving party in this situation is the applicant, who does bear the ultimate burden of proof at hearing. See, 310 CMR 10.03(1)(a). When a motion for summary decision has been made and supported sufficiently, the burden shifts to the opposing party to show by competent evidence that there exists a disputed material factual issue. *Matter of Drohan*, Docket No. 95-083, Final Decision, 3 DEPR 39 (March 1, 1996). In opposing a motion for summary decision, a party must present competent evidence and may not rely on speculative and unsupported assertions. *Matter of Lipkin*, Docket No. 92-043, Final Decision, 2 DEPR 249 (December 22, 1995). Where no material fact is genuinely in dispute, claims

may be disposed of summarily without a hearing. *Matter of John O'Brien, Jr., Trustee, Scenic Heights Realty Trust*, 4 DEPR 180, Final Decision (1997). This is similar to the standard of review in the courts for motions for summary judgment.²

Therefore, I now examine the prefiled expert witness testimony of Mr. Gemma, Mr. Butler and Ms. Freed to determine if any genuine issue of material fact remains as to the two issues for resolution in this adjudicatory proceeding.

IV. Findings as to Genuine Issues of Material Fact and Conclusions of Law

A. ISSUE NO. 1: Has sufficient information been provided by Petitioners to demonstrate compliance with the performance standards of 310 CMR 10.58?

The Department articulated three specific types of information that were deficient in Petitioners' previous submittal: (1) inconsistent and inaccurate delineation of Riverfront Area boundaries; (2) incorrect determination of degraded areas within the Riverfront Area; and (3) incorrect determination of undeveloped areas and areas of alteration. To address these omissions, Petitioners expert, Mr. Gemma, supervised a survey of the areas of the site that would constitute the total Riverfront Area, degraded Riverfront Area and undeveloped Riverfront Area within the definitions of the Wetlands Protection Act and Wetlands Regulations. Mr. Gemma detailed exactly how these surveys were done and why these surveys could be relied upon as accurate when prior surveys could not. Gemma Testimony, ¶ 10. The Department concurred that the surveys were reliable. Freed Testimony, ¶ 10; 15.

² "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120, 571 N.E.2d 357 (1991), citing Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974). An order granting summary judgment will be upheld only if it relies on undisputed material facts, and the moving party is entitled to judgment as a matter of law. *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 556, 340 N.E.2d 877 (1976).

With accurate boundaries established, Mr. Gemma then performed calculations to determine the size of the various types of Riverfront Area. Mr. Gemma found that the total Riverfront Area for the site was 14,619 square feet. Gemma Testimony, ¶ 11. Mr. Gemma also determined that all of the Riverfront Area on the site was in the outer 100-feet of the Riverfront Area. *Id.* Mr. Gemma then calculated the total area of degraded and undeveloped (non-degraded) Riverfront Area, which he highlighted in different colors on a topographical plan. Gemma Testimony ¶ 12. Mr. Gemma concluded that the degraded Riverfront Area totaled 7,404 square feet, leaving 7,215 square feet as undeveloped or non-degraded Riverfront Area. *Id.* The Department concurred with Mr. Gemma's calculations of the total Riverfront Area and of the degraded and undeveloped portions of the Riverfront Area. Freed Testimony, ¶¶10-15. Mr. Gemma also clearly defined an area of 1,783 square feet of previously undeveloped Riverfront Area that would be permanently altered as a result of the Revised Plan, therefore, necessitating a review of the performance standards for restoration and mitigation in 310 CMR 10.58(5). Gemma Testimony, ¶15; Freed Testimony, ¶ 13.

Therefore, I conclude that there is now no genuine issue of material fact in dispute as to the boundaries of Riverfront Area; the dimensions and locations of degraded Riverfront Area and the dimensions and location of undeveloped Riverfront Area, including those areas that will be permanently altered. These are clearly established in the Revised Plan. Therefore, I conclude that there is no genuine issue of material fact in dispute about the sufficiency of the information submitted by Petitioner via the Revised Plan and the testimony of Mr. Gemma. I also conclude that the standard of the regulation for submission of sufficient information has been met.

B. ISSUE NO. 2: Whether the proposed project meets Riverfront area performance standards at 310 CMR 10.58(4)(d)(1) and 310 CMR 10.58(5)(a)-(e)?

Petitioners have also submitted extensive and detailed expert testimony as to why the Revised Plan and Restoration Plan, taken together, constitute a project that meets the Riverfront Area performance standards and may be permitted by final order of conditions issued by the Department.

1. Performance Standards of 10.58(4)(d)(1)

As set forth in detail below as to each portion of the regulation, I conclude that there is no genuine issue of material fact in dispute as to the facts relevant to the determination of compliance with 310 CMR 10.58(4)(d)(1).

Section 10.58(4)(d)1.a: Maximum areas of alteration; preservation of vegetation: The performance standards allow the alteration of up to 5,000 square feet of Riverfront Area at a site, provided that a 100-foot wide area of undisturbed vegetation is provided. See, 310 CMR 10.58(4)(d)1.a. The amount of Riverfront Area to be altered is only 1,783 square feet, far below the 5,000 square foot limit. Gemma Testimony, ¶ 15; Freed Testimony, ¶ 16. Because the Riverfront Area on the Site is only about 60 feet wide, a 100-foot wide area of undisturbed vegetation cannot be provided on this site. Freed Testimony, ¶ 17. Existing vegetative cover must be preserved and extended to the maximum extent feasible, however, in compliance with 310 CMR 10.58(4)(d)1.a. To do so, Petitioners are now proposing to preserve 5,364 square feet of previously undeveloped Riverfront Area and to restore 4,635 square feet of degraded Riverfront Area. Gemma Testimony, ¶¶ 15 & 18; Freed Testimony, ¶ 18. I conclude that the project now complies with the standards of 310 CMR 10.58(4)(d)1.a.

Section 10.58(4)(d)1.b: Stormwater: Mr. Gemma also prepared a stormwater management plan. The Revised Plan now includes collection of runoff from all new impervious surfaces, including driveways and roofs, and the discharge of stormwater into a sub-surface

infiltration system. Gemma Testimony, ¶16. The system is designed to handle all storms up to and including a 100-year storm event. Id. All drainage structures will be located outside of the Riverfront Area or under paved surfaces, minimizing disruption to the Riverfront Area. Gemma Testimony, ¶16. The Department concurs that the stormwater on site will be managed in accordance with the Wetlands Regulations and the Department's Stormwater Management Policy. Freed Testimony, ¶21. I conclude that the project now complies with the standards of 310 CMR 10.58(4)(d)1.b.

Section 10.58(4)(d)1.c: Wildlife habitat: This work will also improve the existing conditions and provisions of enhanced wildlife habitat, therefore complying with the requirements of 310 CMR 10.58(4)(d)1.c. Butler Testimony, ¶10; Freed Testimony, ¶ 18. The revised project will result in removal of debris, impervious surfaces and degraded surface materials. Butler Testimony, ¶ 7. The Restoration Plan will establish a continuous vegetated corridor, which will improve wildlife habitat functions and values. Butler Testimony, ¶ 8-10; Freed Testimony, ¶ 18. I conclude that the project now complies with the standards of 310 CMR 10.58(4)(d)1.c.

Section 10.58(4)(d)1.d: Groundwater and surface water quality protection: The stormwater management system will enhance groundwater recharge and reduce surface water runoff as compared to a pre-project condition. Gemma Testimony, ¶ 17. The Hydrology Report prepared by Mr. Gemma shows a significant increase in groundwater recharge volume, which will help to sustain base flow in Rosemary Brook during drought or low precipitation periods. Id. Surface water runoff will be reduced for all storms up to and including a 100-year event, thereby reducing erosion and sedimentation and transport of pollutants and nutrients into

Rosemary Brook. Id.; Freed Testimony, ¶ 21. I conclude that the project now complies with the standards of 310 CMR 10.58(4)(d)1.d.

2. Performance Standards of 310 CMR 10.58(5)(a)-(e)

Petitioners and the Department agree that the project, as revised, meets the definition of a redevelopment project within the meaning of 310 CMR 10.58(5). I concur with this legal conclusion. Therefore, the project must meet the requirements of that section of the Wetlands Regulations. As set forth in detail below, I conclude that there is no genuine issue of material fact in dispute on the facts relevant to the determination of compliance with the standards of 310 CMR 10.58(5)(a)-(e).

Section 10.58(5)(a): Improvement over existing conditions: The project will “result in an improvement over existing conditions of the capacity of the Riverfront Area to protect the interests” of the Wetlands Protection Act [310 CMR 10.58(5)(a)] “by replacing structures and features that have no habitat value with more naturalistic cover type and vertical complexity.” Butler Testimony, ¶ 11(a). Mr. Butler testified in detail as to exactly how the project will meet this standards through the revisions to the Revised Plan and the Restoration Plan. Butler Testimony, ¶¶ 7-11. The project will also result in an improvement to existing conditions because it will result in a reduction of degraded Riverfront Area by 2,784 square feet. Gemma Testimony, ¶ 18. The Department’s expert also concurred that the project would improve existing conditions for a number of reasons. Freed Testimony, ¶¶ 18 & 20.

Section 10.58(b): Stormwater management: As discussed in detail above, Petitioners expert witnesses and the Department’s expert witness concurred that the revised project would comply with the regulations and policies of the Department governing stormwater.

Section 10.58(c): Project no closer than existing conditions: The proposed new buildings are now all located outside of the Riverfront Area and alteration of that resource area is minimized. See, Revised Plan and Restoration Plan. The new buildings are at a greater distance from Rosemary Brook than existing conditions. Gemma Testimony, ¶ 18; Butler Testimony, ¶ 11(c); Freed Testimony, ¶¶ 15 & 22. Under existing conditions, degraded area was as close as 135-145 feet from the riverbank, while under post-development conditions, degraded area will be about 160-166 feet from the river. Gemma Testimony, ¶ 18; Freed Testimony, ¶ 17.³

Section 10.58(d): Project located as far away from the river as possible: Proposed work must “be located outside the Riverfront Area or toward the Riverfront Area boundary and away from the river.” 310 CMR 10.58(5)(d). The proposed new buildings are now all located outside of the Riverfront Area and alteration of that resource area is minimized. See, Revised Plan and Restoration Plan. All of the proposed work is located further away from the river than the existing degraded Riverfront Area. Gemma Testimony, ¶ 18. Buildings and driveways are located as far from the river as possible. Freed Testimony, ¶ 23.

Section 10.58(e): Proposed work shall not exceed degraded area: The revised project reduces the amount of degraded area on the site from 7,404 square feet to 4,620 square feet, which is a 48% reduction. Butler Testimony, ¶ 11(e); Freed Testimony, ¶ 24. Therefore, “the area of proposed work will not exceed the amount of degraded area,” as required by 310 CMR 10.58(5)(e), but will in fact reduce degraded area at the site overall. Gemma Testimony, ¶ 18; Freed Testimony, ¶ 24.

I conclude that the revised project meets the performance standards of 310 CMR 10.58(5)(a)–(e) in all respects.

³ Note that these two experts differ in their measurements of the two distances by 6 to 10 feet in each measurement. I do not find these differences to be material.

V. Conclusion

The revised project, as evidenced by the Revised Plan, the Restoration Plan and the expert testimony of Mr. Gemma and Mr. Butler does contain sufficient information to permit an evaluation under the Wetlands Regulations and does meet the performance standards of 310 CMR 10.58(4) and (5) for the detailed reasons set forth above. The Petitioner has carried its burden of proof on all issues. No opposition has been received, and Petitioner has submitted convincing evidence that no opposition will be received from Intervenor. The time for filing of a Direct Case in opposition has passed as of May 27, 2008. Therefore, I conclude that summary decision should enter in favor of the Petitioners.

Since a ruling upon the motion for summary decision disposes of all issues in this adjudicatory proceeding, this ruling also serves as a Recommended Final Decision. For all the reasons set forth above, I recommend that the Commissioner enter a Final Decision in favor of the Petitioner on all issues, and I recommend that the Commissioner request that the Northeast Regional Office of the Department prepare a Final Order of Conditions consistent with this Recommended Final Decision, if adopted by the Commissioner.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party

shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

Laurel A. Mackay
Presiding Officer